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Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-272

ROBERT A. BROWN, THOMPSON H. LANG,
ALBUQUERQUE PUBLISHING COMPANY (N.S.L.)
JOURNAL PUBLISHING COMPANY, a corporation,
JERRY CRAWFORD and WILLIAM C. HUME,
Petitioners,

- vs -

HON. RICHARD B. TRAUB, District Judge,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

ERIC D. LANPHERE
JOHNSON AND LANPHERE, P.C.
6400 Uptown Blvd. NE, Suite 200-W
Albuquerque, New Mexico 87110

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Petitioners respectfully pray that a Writ of Certiorari issue to review the Mandate of the Supreme Court of the State of New Mexico entered on May 2, 1979.

OPINIONS BELOW

The Supreme Court of the State of New Mexico, in denying Petitioners' requested Writ of Prohibition and in denying Petitioner's Motion for a Rehearing, rendered no formal opinion. Neither was any formal opinion issued by the New Mexico District Court in which the case originated. The orders entered by these Courts in connection with the subject of this Petition are appended as Appendices A, B, C and D. The letter opinion of the New Mexico District Court is appended as Appendix E.

JURISDICTION

The Mandate of the Supreme Court of the State of New Mexico which denied Petitioner's application for a Writ of Prohibition was entered on May 2, 1979. Petitioners timely filed a Motion for Rehearing in accordance with Rule 19 (a) of the New Mexico Rules of Appellate Procedure in civil cases on May 10, 1979. The Supreme Court of the State of New Mexico entered a mandate denying Petitioners' Motion for Rehearing on June 15, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. May this Court grant immediate review of an Order compelling discovery where meaningful appellate review of the propriety of the discovery order may not be had at the termination of the underlying case?

2. What showing must be made by a plaintiff in a libel action in order to compel discovery of the confidential sources of a news gatherer?

(a) Must plaintiff show that his interest in discovery of the information outweighs defendant's interest in preserving the confidentiality of sources?

(b) Must plaintiff persuade the Court that the discovery sought is so essential to the administration of civil justice that the state has a compelling interest in allowing such discovery?

(c) Must plaintiff show that he has taken reasonable steps in an attempt to obtain the desired information from other sources?

STATEMENT OF FACTS AND PROCEEDINGS

On June 13, 1975, William C. Marchiondo instituted a libel action against the corporate publishers of the two daily newspapers in Albuquerque, New Mexico, and various officers and employees thereof. A supplemental Complaint alleging a new cause of action was filed on May 31, 1978.

Mr. Marchiondo, a prominent (as specifically alleged in his Complaint) local attorney, alleged that four items published by one or both of the Albuquerque daily newspapers were defamatory and prayed for damages, both compensatory and punitive, in an amount exceeding, depending upon construction of the *ad damnum* allegations, eight million dollars:

1. On Sunday, November 3, 1974, the Albuquerque Journal, a daily newspaper of general circulation in Albuquerque, published by the defendant, Journal Publishing Company, printed an editorial announcing its support for the Republican candidate in the upcoming gubernatorial election. With respect to the Democratic candidate, the editorial commented ". . . we question his continued association with Charlie Davis and Bill Marchiondo, prominent Democrats adept at maneuvering in the public arena. As a free-lance lobbyist, Davis' business is influence peddling. As a criminal lawyer, Marchiondo thrives by having friends in key places."

2. On October 27, 1974, the Albuquerque Journal published a paid political advertisement submitted by the New Mexico Republican Party in connection with the same election. The advertisement stated that the Democratic candidate had many "cronies" who would be likely to assert undue influence in his administration if he were elected. The article specifically stated that "Jerry Apodaca would

be the kind of governor who would appoint Billy Marchiondo as chairman of the New Mexico Racing Commission. That's why we say he's the man nobody can afford." This advertisement was published shortly afterward by the Albuquerque Tribune, published by defendant, New Mexico State Tribune Corporation. With respect to this cause of action the Albuquerque Tribune filed a Third-Party Complaint against the New Mexican Republican Party. This Third-Party Complaint is not involved in the particular controversy which is the subject of this Petition.

3. On December 26, 1974, the Albuquerque Journal printed the following comment on an appointment to the local district bench.

> The political implications in McBride's appointment bother us, as does his having received financial support in at least one past election from well-known defense attorney, William Marchiondo.

4. On March 26, 1977, the Albuquerque Journal published an article originated by the Phoenix project of the Investigative Reporters and Editors group. The headline of this article was "Organized Crime Showing Interest in New Mexico", and a photograph of Mr. Marchiondo appeared immediately below this headline.

Defendants answered these allegations by admitting publication of the articles in question but they denied that the publications were defamatory, raised the defense of truth as to the published statements or inferences, and asserted that Mr. Marchiondo was a public figure so as to bring the action within the actual malice standard of *New York Times v. Sullivan,* 376 U.S. 254, 11 L.Ed. 2d 686, 84 S. Ct. 710, 95 ALR 2d 1412 (1964).

The case then entered its discovery phase, in which the

questions which are the subject of this Petition arose. Mr. Marchiondo propounded written Interrogatories to various officers and employees of each newspaper requesting, among other things, all sources of information which had been used by the papers in preparing any article, including articles which were not alleged to be defamatory and which were not the subject of the action, which referred to Mr. Marchiondo, either directly or by implication.* In addition, Mr. Marchiondo issued a subpoena *duces tecum* to William Hume, an investigative reporter for the Albuquerque Journal. (Mr. Hume is not at this writing a named defendant; a Motion is presently pending to add Hume as a named defendant.) Mr. Hume was requested to bring with him to a deposition all documents pertaining to Mr. Marchiondo which he had written or investigated for the last five years,

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*** Typical of the interrogatories propounded by plaintiff Marchiondo to the defendants, on August 26, 1977, were:**

No. 27. "Have you ever received any information from any one in any way connected with Seer's Catalogue or Seer's Rio Grande Weekly regarding the plaintiff. If, so, please state:

. . . (3) The name and address of the person who supplied the information."

No. 45. "Please list every article published in your newspaper in which William C. Marchiondo's name was mentioned, either directly or by innuendo; please include a copy of each of said articles in your answer and for each article please state:

. . . g. all sources of information used in researching the article. * * *"

No. 46. List all reporters, investigators or other sources employed by you or known to you who have done research on William C. Marchiondo. For each such source, please state:

(a) His or her name * * *"

No. 44. "Is there a file or files kept specifically on William C. Marchiondo for use by your paper?
*** * * Also state: ' ' '**

(e) Who is responsible for the information contained in each particular document in said file or files."

and any documentation tending to implicate Mr. Marchiondo in any legal activity.

In consultation with Mr. Hume and others, attorneys for the Albuquerque Journal determined that compliance with these broad requests would result in the disclosure of certain sources who had requested that their names not be revealed by the newspaper, although confidential sources were not relied upon with respect to the preparation of the four articles alleged to be libelous. Accordingly, defendants filed objections to the Interrogatories calling for the disclosure of confidential sources, and with respect to the deposition of Mr. Hume, moved for a Protective Order which would have excused Mr. Hume from bringing with him to the deposition any document which revealed the identity of a confidential source and would have limited the permissible subject of oral examination so as to protect the identity of such sources.

In a letter opinion filed January 15, 1979, the District Judge ruled on the Objections to Interrogatories and the Protective Order, denying any requested relief based on a claim of privilege as to confidential sources. The Court subsequently issued Orders specifically directing defendants to answer Interrogatories as to confidential sources and requiring Mr. Hume to produce documents, which implicate confidential sources, at his deposition. Defendants petitioned to the New Mexico Supreme Court for a Writ of Prohibition against the enforcement of these Orders, which was denied. A timely filed Motion for Rehearing on the requested Writ of Prohibition was also denied.

The present standing of the case is this: Defendants are under orders of the Trial Court to comply with the requests of plaintiff for source information. Defendants

have supplied or are in the process of supplying all source information which is not confidential and information as to those confidential sources who have subsequently consented to the disclosure of their identity. A Writ of Prohibition sought by plaintiff in connection with a discovery question unrelated to the subject of this Petition has been argued and is awaiting decision in the New Mexico Supreme Court. Other discovery is proceeding, and has given rise to several pending Motions for Protective Orders and for compelled answers. A hearing on the merits is presently set for September 4, 1979, but, in light of the various unresolved discovery issues, a continuance has been requested by defendants.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law . . . abridging the freedom . . . of the press; . . ."

Amendment II

". . . or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

REASONS FOR HEARING THIS CASE

This case presents two questions of substantial importance to the legal community and the public generally, one of which is a procedural question, the other is substantive. It is necessary for this Court to act on each of these questions because lower federal and state courts, have, for want of a recent Supreme Court precedent, rendered conflicting decisions, and have given unjust and overboard application to previous decisions of this Court.

The first of these questions, the procedural question, goes to the reviewability (appealability) of the action of the

New Mexico Supreme Court in the present procedural setting, which setting is the review of a discovery Order refusing protection of an asserted newsman's constitutional privilege against disclosure of confidential sources in a civil action.

This Petition, of course, seeks review of a denial of an extraordinary writ, in this case denial of a Writ of Prohibition, and the extraordinary writ was, in turn, sought in the context of a discovery order. Petitioners readily concede that an extraordinary writ is indeed reserved for the extraordinary cases, *Ex parte Fahey,* 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947). THIS IS AN EXTRAORDINARY CASE. It need not be a "cause celebre". Petitioners have urged continuously that they would have no adequate remedy by appeal, that the order of the trial court, in its extraordinary breadth, is an abuse of discretion, all of which is coupled with the fact that the newsman's privilege has never been considered by this Court in the context of civil litigation. Petitioners, therefore, rely upon *Schlagenhauf v. Holder,* 379 U.S. 104, 55 S.Ct. 234, 13 L.Ed.2d 152 (1964), and its progeny, in their attempt to prevent the rape of their asserted Constitutional privilege. For further cases, approving use, to correct discovery order abuses, of an extraordinary writ, see *Hartley Pen Co. v. United States District Court,* 287 F.2d 324 (9th Cir., 1961); *United States v. Hemphill,* 369 F.2d 539 (4th Cir., 1966); *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir., 1970), aff. per curiam, 400 U.S. 348, 91 S.Ct. 470, 27 L.Ed.2d 433 (1971); *Sanderson v. Winner,* 507 F.2d 477 (10th Cir., 1974), cert. den. 421 U.S. 914 (1975); *Heathman v. United States District Court for Central District of California,* 503 F.2d 1032 (9th Cir., 1974).

The jurisdiction of this Court is derived from 28 U.S.C. §1257, which provides for review by appeal or certiorari from "*final judgments* or decrees rendered by the highest court in the state in which decision could be had . . ." The finality reqirement of 28 U.S.C.§ 1257 is subject to the same considerations as the final decision requirement of 28 U.S.C. §1291, governing interlocutory appeals. *New York Times v. Jascalevitch,* .... U.S. ...., 98 S. Ct. 3058 (1978).

Alexander v. United States, 201 U.S. 117 50 L. Ed. 686, 26 S. Ct. 356 (1906), sets forth the general proposition that discovery orders were not "final" judgments so as to be appealable prior to final disposition of the underlying case. The reasoning behind this rule was developed in *Cobbledick v. United States,* 309 U.S. 323, 84 L. Ed. 783 (1940);

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first judiciary act and has been departed from only where observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not the necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise from its initiation to the entry of final judgment. *Id.* at 325-326 (footnotes omitted).

These considerations of judicial economy and the avoidance of delay and harassment indeed provide a compelling rationale for the application of the finality rule, but the holding of *Cobbledick* does not exclude other considerations.

> Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statute. *Id.* at 329.

The specific legal issues in this Petition concern the appealability of a discovery Order requiring, in a libel action, disclosure of newsmen's alleged confidential sources, and the underlying substantive issue is the existence or nonexistence of any privilege against such disclosures. However, the practical issues inherent in the particular factual situation out of which this Petition arises more vividly reveal Petitioner's plight and, in turn, reveal the need for the review here sought. The practicalities arise out of the fact that the discovery ordered was not discovery of sources relied upon in publishing the allegedly defamatory material, rather, the order, in essence, directed discovery of any source ever furnishing any information to the Petitioners (defendants) concerning the libel plaintiff. The practical issues presented for review can, thereto, be stated as follows:

1) Where members of the news media are sued for defamation, are all confidential sources open to discovery regardless of the fact that such confidential sources furnished nothing to the defendants which was relied upon to publish that which is alleged to have been defamatory, and

2) Where the decisions of the various courts of the United States are hopelessly split as to the existence of any First Amendment qualified privilege against disclosure of media confidential sources, must a media defendant subject itself to criminal contempt and default judgment to seek review of an unbridled inquiry into the identity of confidential sources, which sources were not relied upon in alleged defamatory publications?

In short, the practical ramifications of a denial of the instant Petition is to permit any person, criticized in some fashion by the news media, to simply file a multimillion dollar libel action, immediately file a sweeping set of Interrogatories demanding disclosure of the identity of sources of information ever furnished to the libel defendant concerning the plaintiff, regardless of whether relied upon in the allegedly defamatory publication, and immediately force the media defendant into a criminal contempt and default judgment posture by the defendant's refusal to breach its covenant of confidence with its sources.

It is in this context that Petitioners here contend that the requirement of "finality", ordinarily a bar to the appealibility of a discovery Order, should here be held inapplicable under the well established principle that the requirement of finality be given a "practical rather than a technical construction". *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 13 L.Ed. 2d 199, 85 S.Ct. 308 (1964); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974).

The spectre of a default judgment for ruinous damages is not an imaginary evil, as amply demonstrated by the recent default judgment entered in Idaho, in a libel case, and as a result of refusal to divulge confidential sources, and for the eye-opening sum of 1.9 million dollars. *Sierra Life Insurance v. Magic Valley Newspapers*, 4 Med.L. Rptr. 1689 (Idaho State District Court 1978). It is well worth noting that in that case the default judgment was entered despite a specific holding that the Plaintiff was a public figure and that plaintiff had utterly failed to demonstrate "constitutional malice". [In the instant case, as is set forth

in the Statement of the Case, supra, the defendants have asserted that the plaintiff is a "public figure" but that issue has not yet been determined by the trial court.]

Petitioners' dilemma is rendered all the more acute by the fact that this Court has never addressed the issue of a qualified newsman's privilege in a civil case, and its decision in a criminal law, grand-jury context, *Branzburg v. Hayes,* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), has been cited both as a positive denouncement of any such privilege, *Dow Jones & Company v. Superior Court,* 364 Mass. 317, 303 N.E. 2d (1973), including Petitioner's jurisdiction, *Ammerman v. Hubbard Broadcasting, Inc.,* 91 N.M. 250, 527 P. 2d 1258 (1977), and, on the other hand, as the beacon of truth that there is such a privilege, *Hart v. Playboy Enterprises,* 4 Med. L. Rptr. 1616 (D. Kan. 1978); *Mize v. McGraw Hill,* 5 Med. L. Rptr. 1156 (S.D. Tex. 1979).

It is into this sea of uncertainty that Petitioners must apprehensively attempt to navigate. Nor are the shorelines by any means clearly discernible. If caught by the Scylla of *Dow Jones* or *Ammerman* on the one side, the Petitioners face anything from a monstrous default judgment to volunteering themselves to the onus of criminal contempt, before, says the Supreme Court of New Mexico, they can urge before an appellate tribunal that has already decided otherwise, (See *Ammerman, supra*) that the United States Constitution provides a qualified constitutional privilege. Petitioners therefore, by this Petition steer to the opposite shore, engulfed in the mist of *Branzburg,* hoping that they are not in the Straits of Messina at all.

To bar an appeal under the circumstances by the "finality rule", would be to reserve the cloak of the Constitution

to the most audacious or the most [illegible]y, who would risk their criminal-free reputation or [illegible]eir livelihood, or both, in order to assert what they believe, and numerous courts have agreed upon, is a Constitutionally established privilege necessary to a free press and an informed public. To hold that there is a plain and adequate remedy by subjecting itself to a default or to criminal contempt, under these circumstances, where the lawfulness of the conduct has never been defined and is totally immersed in contradictory pronouncements, should provide the framework of great and immediate public concern in which practicalities outweigh the technicalities of any "finality rule" argument.

The practical desirability of permitting an appeal in the context of a constitutional-criminal contempt confrontation has been previously articulated:

> When discovery is compelled over a claim of privilege, the potential injury would seem sufficiently serious to allow interlocutory review. Both the social policy represented by a grant of privilege and the benefit conferred on the privilege-holder are undermined by pretrial procedures in which a person may be forced to give up information without opportunity to test on appeal the validity of his objection. Effective protection of the privilege would seem to outweigh the delay and expense of allowing an appeal. *Developments in the Law-Discovery,* 74 Harv. L. Rev., 940, 994 (1961).

The preceding arguments of Petitioners are addressed to a general desirability of appealability, although couched in terms of the unusual breadth of the discovery order sought to be appealed from and its practical effect of any semblance of privilege. The argument, as suggested by the author of the Harvard Law Review article just quoted, fits a more specifically defined exception to the "finality rule",

which is the so-called "collateral - orders doctrine". Under this doctrine, first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), when a trial court order disposes of an issue which is collateral to the subject matter of the litigation and which will expose a person to irreperable injury if appeal is postponed to the final decision, an immediate appeal is permissible.

As to the element of irreperable injury:

> The irreperable injury requirement would appear to be satisfied in the case of orders compelling discovery over a claim of privilege. Developments in the Law-Discovery, *supra,* at 1000.

As to the "collateral" element, this Court has defined collateral orders as:

> Matters embraced in (a) decision (which are) not of such . . . nature as to affect, or to be affected by, decisions of the merits of (the) case. *Cohen v. Beneficial Industrial Loan Corp.*, supra, at 546.

Clearly, the granting of discovery of privileged sources, who were not even established as having been relied upon in publication of the allegedly defamatory matter, cannot reasonably be anticipated as reversible error, should plaintiff prevail in his libel action. In this regard New Mexico has substantially adopted Rule 61 of the Federal Rules of Civil Procedure, as follows:

> Rule 61. Harmless error.
>
> No error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The collateral source rule is thus generally understood to have three elements, (1) separability, (2) importance, and (3) urgency. *Grinnell Corp. v. Hackett,* 519 F. 2d 595 (1st Cir. 1795), *cert den.* 423 U.S. 1033, 46 L. Ed. 2d 407, 96 S. Ct. 566 (1975). This is, of course, why Petitioners discuss under this heading both the procedural and the substantive issues, although both partake of the necessary importance and urgency. Each element is here present. The finality rule, if strictly applied as under *Alexander v. United States, supra,* would, in effect, direct Petitioners to seek later relief by appeal, presumably from a contempt citation or a default judgment. The present situation is, therefore, analogous to the finality rule normally observed as a condition precedent to a writ of mandamus. *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 74 S. Ct. 145, 98 L. Ed. 106 (1953). However, where there exists a threat of an invasion of personal rights, coupled with a lack of guiding precedent, or, in effect, a matter of first impression is involved, this Court has not hesitated to set at rest, by accepting appeal, issues of extreme importance to the public and bar. *Schlagenhauf v. Holder,* 379 U.S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234. Certiorari is peculiarly appropriate where there are clear conflicts among lower courts. *DiBella v. United States,* 369 U.S. 121, 7 L. Ed. 2d 614, 82 S. Ct. 654 (1962). That matters under the First Amendment have been long considered of such importance as to leave them unanswered as intolerable, is well established. *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730

(1974). *Mills v. State of Alabama,* 384 U.S. 214, 16 L. Ed. 2d 484, 86 S. Ct. 2831 (1966).

Likewise, to force a criminal contempt citation, or default judgment, as a condition precedent to appealability of an assertion of a First Amendment right should also be viewed as intolerable. *State ex rel Beacon Journal Pub. Co. v. Kainrad,* 46 Ohio St. 2d 349, 348 N.E. 2d 695 (1976). See also, *Sav-On Drugs, Inc. v. Superior Court of Los Angeles County,* 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P. 2d 739 (1975).

In summary, the finality rule should not bar review in the present case (a) under the rule of practical rather than technical construction, announced in *Cohen* and *Gillespie, supra,* (b) under the collateral order doctrine of *Cohen, supra,* and (c) under the doctrines of First Amendment first impression importance recognized in *Miami Herald* and *Mills, supra,* or of first impression and importance to the bar and to the public inherent in *Schlagenhauf, supra.*

Petitioner, would, in fact urge adoption of a clear cut rule of appealability of discovery motions, or at minimum, no absolute bar of appealability, where the discovery order sought to be reviewed involves: (a) the assertion of a constitutional privilege against disclosure, and (b) a matter of first impression in this Court, concerning which there is substantial conflict in the lower courts.

Petitioner turns now to the merits in this case.

The possibility of the existence of a qualified testimonial privilege for news gatherers was addressed by this Court for the first and only time in *Branzburg v. Hayes,* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972). This plurality opinion has spawned an extraordinary amount of confusion

among state and federal courts alike in cases involving criminal matters as involved in *Branzburg,* and also in civil cases.

Lower federal and state courts which have attempted to interpret *Branzburg's* holding in the context of civil litigation, particularly libel actions, have reached widely varying results. In *Caldero v. Tribune Pub. Co.,* 98 Idaho 288, 562, P. 2d 791 (1977), the Idaho Supreme Court concluded:

> Therefore, our reading of Branzburg v. Hayes . . . is to the effect that no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version. The only restrictions against compelled disclosure appear to be at those cases where it is demonstrably intended to unnecessarily harass members of the news media on a broad scale by means of having an unnecessary impact on protected rights of speech, press or association.

On the other hand, the Tenth Circuit Court of Appeals has taken the attitude that an existence of a qualified privilege is "no longer in doubt" after *Branzburg. Silkwood v. Kerr-McGee Corp.,* 563 F. 2d 433 (10th Cir., 1977), at 437.

The divergent, and in fact diametrically opposed approaches in the attempted application of this Court's holding in *Branzburg* impels one to conclude that further guiding light from this Court is sorely required. Petitioner respectfully submits that the expansive interpretation of *Branzburg* as denying altogether the existence of a news gatherer's privilege, as typified by the Idaho Supreme Court's decision in *Caldero, supra,* has created substantial and undesirable inroads into the constitutionally protected freedom of the American press. Accordingly, petitioner prays that this Court use this opportunity to exand upon

its earlier holding in *Branzburg* in order to avert this mischief.

The decision below lets stand an unwarranted infringement of an intrusion into the ability of the news media to vigilantly and effectively gather news, with absolutely no showing that there is an overriding state interest justifying such intrusion and infringement, and with no inquiry into any alternative but to require compelled disclosure of the newsman's confidential source. The New Mexico Supreme Court did not write an opinion explaining its failure to intervene and to prevent the District Court from making such an infringement, except to obliquely suggest that Petitioners had an adequate remedy by appeal, without any attempt to even suggest what appellate avenue it thought adequate.

The starting point for any inquiry into the existence of a qualified news gatherer's privilege against disclosure of confidential sources is *Branzburg v. Hayes,* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972). An examination of the four opinions filed shows that in spite of the fact that this Court voted 5-4 to uphold the compelled disclosure of confidential sources, in the context of a grand jury inquiry, that some qualified privilege against disclosure does exist. Justice White, writing for the plurality, holds that:

> On the records now before us we receive no basis for holding that the public interest in law enforcement and in insuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial. 408 U.S. at 690-91.

Justice White noted, however, that a newsman's obligation

to appear and testify before a grand jury is not beyond challenge:

> Grant jury investigations, if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. 408 U.S. at 770.

In his concurring opinion, Justice Powell acknowledged the general obligation of news reporters to testify before grand juries, even regarding their confidential news sources. Justice Powell, however, expanded the scope of the First Amendment protection against disclosure of news sources beyond the situation where a grand jury is being conducted in good faith. He noted that:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. *Id.* at 710.

Beyond this requirement that, on case-by-case basis, the competing interests of disclosure and confidentiality be balanced, Justice Powell stated that a newsman might seek a motion to quash or a protective order whenever he was:

> . . . called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that this testimony implicated confidential news source relationships without legitimate need of law enforcement.

Thus, although Justice White's plurality opinion would require that a newsman testify concerning confidential news sources before grand juries, save where the grand jury's investigation is conducted in bad faith, Justice Powell's concurring opinion would accord greater protection against

disclosure by requiring, after the competing interests have been weighed, the showing of sufficiently compelling state interest in disclosure and a showing that the information sought to be disclosed is relevant to the subject of the grand jury's criminal investigation. In these respects, Justice Powell's concurring opinion is similar to Justice Stewart's dissenting opinion, where he urged, as a precondition to disclosure, a showing of: (1) relevance; (2) exhaustion of alternative sources for the information sought; and (3) a compelling state interest. Thus, the fact that *Branzburg* was decided in the context of a grand jury's investigation of a newsman's actual observation of criminal conduct, and the nature of Justice Powell's special concurring opinion, leaves the precedential value of *Branzburg* in civil litigation very uncertain.

Judicial decisions subsequent to *Branzburg,* make it clear the Courts have, in the area of civil litigation, discerned that *Branzburg* does not preclude an inquiry into a qualified privilege. In *Cervantes v. Time, Inc.,* 464 F. 2d 986 (8th Cir., 1972), *cert. den.* 409 U.S. 1125 (1973), a civil libel action wherein plaintiff, the mayor of St. Louis, sought disclosure of defendant's confidential sources, the 8th Circuit Court of Appeals emphasized the limited scope of this Court's holding in *Branzburg*:

> The Court was not faced with and, therefore did not address, the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense. 464 F. 2d at 993, n.9.

In another civil libel action, *Carey v. Hume,* 492 F. 2d, 631, 635-636 (D.C. Cir., 1974), the District of Columbia Circuit Court of Appeals stated:

> [A]ppellant was content to present the case to us upon the theory that the First Amendment left no room, under any circumstances, for compelling a newsman to indentify his source. That is clearly not the law after *Branzburg* with respect to criminal proceedings, and it appears to us that *Branzburg,* in language, if not in holding, left intact, insofar as civil litigation is concerned, the approach . . . that the court will look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public right to know is impaired.

And, in a footnote:

> Although it is certainly necessary to consider carefully the emphasis in *Branzburg* upon the public interest in the giving of testimony, we do not believe that it automatically controls this case. This is a civil libel suit rather than a grand jury inquiry into crime, and the dispute over disclosure is between the press and the government. This difference is of some importance, since the central thrust of Justice White's opinion for the court concerns the traditional importance of grand juries and the strong public interest in the effective enforcement of the criminal law. Justice White also relied on the various procedures available to prosecutors and grand juries to protect informants and on careful use by the government of the power to compel testimony. Private litigants are not similarly charged with the public interest and may be more prone to seek wholesale and indiscriminate disclosure. 492 F. 2d at 636, n. 6.

In another civil libel action, *Baker v. F & F Investment,* 470 F. 2d 778 (2d Cir., 1972), *cert. den.* 411 U.S. 966 (1973), the Second Circuit Court of Appeals directly addressed the weight to be given *Branzburg* in a civil context:

> Manifestly, the [Supreme] Court's concern with the

> integrity of the grand jury as an investigatory arm of the criminal justice system distinguishes *Branzburg* from the case presently before us. If, as Mr. Justice Powell notes in that case, instances will arise in which First Amendment values outweigh the duty of the journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure . . . 470 F. 2d at 784-785.

In accord with this interpretation limiting the scope of *Branzburg's* applicability, even in the grand jury context, is the case of *Bursey v. United States,* 466 F. 2d 1059 (9th Cir., 1972) Rehearing Denied, 466 F. 2d 1090 (1972). In this case, reporters for the Black Panther Party's newspaper were held in contempt for refusing to answer questions propounded by a federal grand jury. The Ninth Circuit Court of Appeals held that the witnesses could be compelled to answer questions relevant to the subject matters of the criminal investigation for which the witnesses received immunity. The reporters, therefore, were required to testify concerning the presence of illegal weapons at Panther headquarters and other criminal activity which they may have directly observed. The court held, however, that they were not required to answer inquiries about the identity of persons with whom the witnesses were associated either on the newspaper or in the Black Panther party itself, even though the answers to these inquiries "might have something vaguely to do with conduct that might have criminal consequences." 466 F. 2d at 1091.

In so ruling, the court applied a balancing test requiring as a precondition to compel disclosure of the identity of confidential news sources and other associates, a showing of a

compelling state interest, relevance, and exhaustion of alternative sources. The court specifically articulated the evidentiary showing necessary to compel disclosure:

> When the collision [between government activity and First Amendment rights] occurs in the context of a grand jury investigation, the government's burden is not met unless it establishes that the government's interest in the subject matter of the investigation is 'immediate, substantial, and subordinating', that there is a 'substantial connection' between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining the information is not more drastic than necessary to forward the asserted. 446 F. 2d at 1083.

Moreover,

> [t]he fact alone that the governmental has a compelling interest in the subject matter of a grand jury investigation does not establish that it has any compelling need for the answers to any specific questions. The court must decide whether the government has carried its burden almost question by question before it can compel answers. *Id.* at 1086.

The *Bursey* decision was undoubtedly written prior to this Court's decision in *Branzburg,* for it was released the following day. In its Opinion on the Petition for Rehearing, subsequently filed by the government, the Court stated that although "news gathering was never a real issue here", 466 F. 2d 1090, n. 1, the decision in *Branzburg* is applicable and does not dispense with the need for balancing the competing interests on a case-by-case basis:

> First, *Branzburg, Pappas,* and *Caldwell* are not inconsistent with either our reasoning or the result we have reached. . . .
>
> Although there is some language in Mr. Justice White's

opinion in *Branzburg,* (408 U.S. at 665, 92 S. Ct. at 2646) implying that a grand jury investigation carries with it ingredients that may favor balance for the government as against the First Amendment, the passage does not purport to disavow the balancing standares enunciated in such cases as *DeGregory v. Atty General of New Hampshire* (1966), 383 U.S. 825, 86 S. Ct. 1148, 16 L. Ed. 2d 292; *Gibson v. Florida Legislative Investigation Committee* (1963) 372 U.S. 539, 83 S. Ct. 889, L. Ed. 2d 929, and *Bates v. Little Rock* (1960), 361 U.S. 516, 80 S. Ct. 412, 4 L.Ed. 2d 480 . . . [W]e have concluded that the balance we struck is not impaired by *Branzburg. Id.* at 1091.

In *Hart v. Playboy Enterprises,* 4 Med. L. Rptr. 1616 (D. Kan. 1978), also a libel action, the libel defendants were held to be insulated from disclosure from confidential sources, whose identities were sought in written interrogatories, under an express holding that a qualified privilege exists, unless and until the plaintiff had shown a substantial need for preparation of the plaintiff's case, and inability without undue hardship to obtain the substantial equivalent by other means.

In the recent case of *Mize v. McGraw-Hill,* 5 Med. L. Rptr. 1156 (S.D. Tex. 1979), the trial court after reviewing *Branzburg* and subsequent cases, enumerated reasonable requirements to be met by an allegedly libeled plaintiff before the discovery of confidential sources is compelled:

> It is apparent from the state of this record that Mr. Mize seeks to compel disclosure in this instance as a preliminary discovery matter rather than as a 'last resort'. There is no evidence in the record of attempts by this plaintiff to discover facts which would prove or lead to proof of the required elements of this claim. None of the courts which have ordered disclosure of a confidential news source have done so on the basis of a

> relatively barren record such as this in the form of an 'advance ruling'. Such paramount competing interests as freedom of the press and the plaintiff's right to develop his case cannot be weighed and balanced in a vacuum. There has been no showing of necessity, as required by *Garland* [*v. Torre* 259 F.2d 545 (2n Cir.), Cert. Denied, 358 U.S. 919 (1958)], only plaintiff's unsupported protestations of need which clearly do not justify so drastic an incursion into First Amendment processes as the compulsory disclosure of a news reporter's confidential source. Furthermore, there has been no showing that the identity of a news source goes to the heart of the plaintiff's claim, or that alternative sources had been exhausted. For these reasons, plaintiff's motion to compel will be denied.

On the other hand other jurisdictions, including New Mexico, in the specific context of libel litigation, have concluded that there is no newsmen's confidential source privilege — period. Thus in *Ammerman v. Hubbard Broadcasting, Inc.,* 91 N.M. 250, 572 P.2d 1258 (1977), where four deputy sheriffs suing a radio station for allegedly defamatory radio broadcasts, sought to compel disclosure of identities of sources *whose information was relied upon* in making the broadcast, the Court of Appeals of New Mexico has flatly stated:

> The First Amendment does not grant a broadcaster any privilege, qualified or absolute, to refuse to reveal confidential information which is admittedly relevant to a court proceeding. 91 N.M. at page 257.

To the same effect is *Dow Jones & Company, Inc. v. Superior Court,* 364 Mass. 317, 303 N.E. 2d 847 (1973).

Therefore, in cases specifically involving alleged defamation, and where *defendants'* confidential sources have

been sought, New Mexico,[1] Massachusetts,[2] and Idaho[3] state court decisions have declared that there is no privilege whatsoever, and, therefore, no balancing of interests has been undertaken. To the contrary are decisions from the United States District Court, District of Kansas,[4] the United States District Court, Southern District of Texas,[5] the United States Court of Appeals, District of Columbia Circuit,[6] a Connecticut Superior Court[7] and the California Superior Court[8] which have all determined that a qualified privilege exists. In summary, three jurisdictions have determined that there is no privilege, five jurisdictions have determined otherwise.

Privilege has, of course, been found to exist in favor of non-party newsmen. See e.g. *Winegard v. Oxberger,* 258 N.W. 2d 847 (Iowa 1977); *Gulliver's Periodicals, Ltd. v. Ghas. Levy Cir. Co.,* 455 F.S. 1197 (D.C. N.D. Ill., 1978); *Amato v. Fellner,* 4 Med. L. Rptr. 1552 (Wisc. Dist. Ct. 1978).

In the istant case, unlike the here challenged cases of *Ammerman, Dow Jones* and *Caldero,* the court did not even require that the plaintiff demonstrate that the confidential sources contributed any information even relied upon, much less were quoted or paraphrased, in the allegedly defamatory publication. Rather in the instant case, the plaintiff's interrogatories were directed to any facts defendants had

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(1) Ammerman v. Hubbard Broadcasting, Inc., supra.
(2) Dow Jones & Company, Inc. v. Supreme Court, supra
(3) Caldero v. Tribune Pub. Co., supra.
(4) Hart v. Playboy Enterprises, supra.
(5) Mize v. McGraw-Hill, supra.
(6) Carey v. Hume, supra.
(7) Goldfeld v. Post Publishing, 4 Med. L. Rptr. 1167 (Conn. Superior Ct. 1978).
(8) Rancho La Costa v. Penthouse, 4 Med. L. Rptr. 1564 (Cal. Superior Ct. 1978).

concerning plaintiff, and any source of such facts, regardless of whether any such facts were relied upon or claimed to have been relied upon in publishing the allegedly defamatory materials.

As in *Mize,* there is no evidence in the record of the instant case to indicate that the trial court had any basis on which to balance the interests of petitioner in preserving the confidentiality of its news sources against the benefit to respondent in obtaining the information. There has been no showing that the requested information goes to the heart of the underlying libel action, and no record of any effort made by respondent to obtain the information by any other means. Accordingly, the court should take this opportunity to expressly clarify the principle that news gatherers have a qualified privilege against the disclosure of confidential sources which should be weighed against the interest served by allowing discovery of such sources. It must be made clear that the confidences of a news gatherer will not be breached upon the mere unsupported allegation of an opposing civil litigant that such information is relevant; to preserve the integrity of the First Amendment, the court must take the position that such confidences will be breached only when it can be shown that justice requires such disclosure.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the Mandate of the Supreme Court of the State of New Mexico.

RESPECTFULLY SUBMITTED,
ERIC D. LANPHERE
JOHNSON AND LANPHERE, P.C.
Attorneys for Petitioners
6400 Uptown Blvd., Suite 200-West
Albuquerque, New Mexico 87110
(505) 881-3333

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Wednesday, May 2, 1979

NO. 12,488

ROBERT A. BROWN, et al.,
Petitioners,

vs. Original Prohibition Proceeding

HON. RICHARD B. TRAUB,
District Judge,
Respondent.

This matter coming on for consideration by the Court upon petition for writ of prohibition, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of prohibition be and the same is hereby denied.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Tuesday, June 12, 1979

NO. 12,488

ROBERT A. BROWN, et al.,
Petitioners,

vs. Original Prohibition Proceeding

HON. RICHARD B. TRAUB,
District Judge,
Respondent.

This matter coming on for consideration by the Court upon motion of Petitioners for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises.

NOW, THEREFORE, IT IS ORDERED that motion of Petitioners for rehearing be and the same is hereby denied.

APPENDIX C

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. CV 75-02838

ROBERT A. BROWN, et al.,
Defendants.

ORDER UPON OBJECTIONS TO
INTERROGATORIES

The objections of Defendants Thompson H. Lang, Robert A. Brown, William C. Hume and Jerry Crawford having come on before the Court, the Court being fully advised in the premises, having considered the arguments of counsel and the memorandum briefs submitted in support, and otherwise being fully advised in the premises, and believing that the objections are well taken in part and not well taken in part, NOW THEREFORE:

IT IS HEREBY ORDERED, DECREED AND ADJUDGED, as follows:

(1) Defendants objections to Plaintiff's interrogatories calling for thoughts, opinions or editorial judgments are sustained pending the U.S. Supreme Court's decision in *Herbert v. Lando,* unless required be ruled upon in the event the trial of this cause occurs prior to the said decision, in which event the Court will rule, upon application by Plaintiff.

(2) Defendants Brown in directed and within fifteen days hereof shall answer Plaintiff's interrogatories numbered 31(d); 32(b); 33(b); 33(c); 35; 53(g); 54; 61(b) and 61(c).

(3) William C. Hume is directed and within fifteen days hereof shall answer Plaintiff's interrogatories numbered 21(b) and 21(e).

IT IS SO ORDERED.

APPENDIX D

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. CV 75-02838

ROBERT A. BROWN, et al.,
Defendants.

ORDER DENYING DEFENDANT WILLIAM C. HUME'S MOTION TO QUASH SUBPOENA DUCES TECUM AND GRANTING MOTION FOR PROTECTIVE ORDER IN PART

The Motion of Defendant William C. Hume to Quash Subpoena Duces Tecum, or for a Protective Order having come on before the Court for hearing; the Court having considered the arguments of counsel and the memorandum briefs, and believing that the Motion to Quash is not well taken and should be denied and that the Motion for a Protective Order is well taken in part, NOW THEREFORE,

IT IS HEREBY ORDERED, DECREED AND ADJUDGED as follows:

(1) That the said Defendant's Motion to Quash is denied;

(2) The Motion for a Protective Order is granted in the following particulars:

(a) The duces tecum portion of the Subpoena shall be limited to times prior to the date of publication of the libelous articles.

(b) No documents shall be produced upon which an attorney-client privilege or work product is claimed, however, they shall be identified sufficiently to alert the Court as to their nature so that an appropriate ruling can be made if necessary. Any questions propounded to Mr. William C. Hume to which objection is made upon this basis, or document to which production is sought and to which

objection is made upon this basis shall be subsequently ruled upon by the Court, if so requested by Plaintiff, after an in camera inspection thereof.

(c) That portion of the Protective Order seeking non-disclosure based on confidential sources is denied.

(d) That portion of the Protective Order seeking non-disclosure based on mental thoughts, opinions or conclusions which led to editorial judgments is granted, without prejudice to the Plaintiff, until the U.S. Supreme Court rules in the case of *Hubert v. Lando,* unless this action proceeds to trial before the case is decided in which event the Court shall rule further.

(e) Defendant Hume shall be required to produce such documents or other requested items as shall be in his possession or under his control.

IT IS SO ORDERED.

APPENDIX E

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT
LETTER OPINION OF DISTRICT COURT

January 15, 1979

Re: William C. Marchiondo vs. Robert A. Brown, et al.
Cause No. 75-02838

Gentlemen:

The Court has reviewed the memorandum briefs submitted herein and rules as follows:

Objections to Interrogatories

a) Insofar as interrogatories call for thoughts, opinions and conclusions which led to editorial judgments, the Court will defer ruling until the U.S. Supreme Court rules in the case of Herbert v. Lando, unless required to rule sooner in the event the instant case goes to trial prior to the Herbert v. Londo decision. If counsel cannot agree which interrogatories fit into this category, the Court will conduct a further hearing and make this decision.

b) All objections based on claim of privilege by a newsman not to divulge his confidential sources are denied.

c) The defendant's objections as to the three items claimed to be attorney's work product are sustained, subject to the agreements contained in defendant's brief.

William Hume — Subpoena Duces Tecum

a) The motion to quash is denied.

b) The motion for a protective order is granted in the following particulars:

1. The duces tecum portion of the subpoena shall be limited as to time prior to the date of publication of the alleged libelous articles.

2. No documents shall be produced upon which an attorney-client privilege/or attorney work product is claimed, however, they shall be identified sufficiently to alert the Court as to their nature so that an appropriate ruling can be made, if necessary.

3. Any claimed privilege of non-disclosure based on confidential sources is denied.

4. Any claim of privilege based on mental thought processes forming a basis for editorial judgments shall be subject to the ruling hereinabove made regarding interrogatories.

5. Mr. Hume shall only be required to produce such documents, etc., as shall be in his possession or under his control.

Mr. Romero shall submit a form of order within ten days.